No. 11954

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GARFIELD C. BARNETT,
Appellant

vs.

UNITED STATES OF AMERICA,
Appellee

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

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JURISDICTION OF THE COURT

This is an appeal from a conviction in the District Court of the Western District of Washington, Northern Division, upon an indictment charging ap-

pellant and others with the illegal sale of narcotics and with a conspiracy to violate the law.

The Federal Courts have jurisdiction to determine all crimes and offenses cognizable under the authority of the United States and issues arising out of the construction of Federal Statutes (28 U.S.C.A. 41; Judicial Code, Section 24 amended)

The Circuit Court of Appeals has jurisdiction to review judgments of the district court (28 U.S.C.A. 225; Judicial Code Section 128 amended).

STATEMENT OF THE CASE

The Grand Jury for the Northern Division of the Western District of Washington returned an indictment as follows:

"Indictment

The Grand Jury charges:

COUNT I

On or about February 7, 1948, at Everett, Washington, Garfield C. Barnett, Ralph R. Macartney, Jr., and Leonard A. Douglas, sold, bartered and exchanged to Joseph E. Goode the following narcotic drugs:

1 bottle containing 189 ½ gr. morphine sulphate tablets

1 bottle containing 292 1/6 gr. morphine sulphate tablets

1 bottle containing 501 ¼ gr. morphine sulphate tablets

1 bottle containing 85 1/8 gr. morphine sulphate tablets
63 1/2 gr. morphine sulphate tablets
1 bottle containing 177 gr. powdered opium
1 bottle containing 61 1/4 gr. codeine sulphate tablets
1 bottle containing 100 1/4 gr. codeine phosphate tablets
1 bottle containing 100 1/2 gr. codeine sulphate tablets
1 bottle containing 502 1/2 gr. codeine sulphate tablets
1 bottle containing 40 copavin tablets
1 bottle containing 100 5-mg. dolophine tablets
1 bottle containing 39 copavin capsules
1 bottle containing 93 acetidine with codeine phosphate tablets

and said sale, barter, and exchange was not made pursuant to the written order of Joseph E. Goode upon a form issued for that purpose by the Secretary of the Treasury of the United States.

All in violation of 26 USC 2554(a) and 2557(b).

COUNT II

On or about and during the period from January 6, 1948, to February 7, 1948, both dates included, at Everett, Washington, and other places in Snohomish County, Washington, and at Seattle, Washington, Garfield C. Barnett, Ralph R. Macartney, Jr., and Leonard A. Douglas, hereinafter called the defendants, conspired each with the other to commit an offense against the United States, to-wit, to violate the provisions of Section 2554(a) of Title 26, United States Code, in this, that said defendants conspired to sell, barter and exchange the narcotic drugs described in

the first count of this Indictment to Joseph E. Goode, Harvey Neylon, and other persons to these grand jurors unknown, such sale, barter and exchange not to be made pursuant to the written order of the person or persons to whom said narcotics were to be sold, bartered or exchanged upon a form issued for that purpose by the Secretary of the Treasury of the United States.

That after the formation of said conspiracy, and in order to effect the object thereof, the defendants committed certain overt acts as follows:

1. During the period from January 6, 1948, to January 16, 1948, at Everett, Washington, the defendants Leonard A. Douglas and Ralph R. Macartney, Jr., had a conversation with each other.

2. On or about January 17, 1948, the defendant Garfield C. Barnett drove from Everett, Washington, to the home of the defendant Leonard A. Douglas at Snohomish, Washington.

3. On or about January 17, 1948, at Snohomish, Washington, the defendant Leonard A. Douglas delivered to the defendant Garfield C. Barnett a box containing the drugs described in Count I of this Indictment.

4. At some date between January 16, 1948, and February 7, 1948, the exact time being to the grand jurors unknown, at Everett, Washington, the defendants Garfield C. Barnett, and Ralph R. Macartney, Jr., held a conversation with Harvey Neylon.

5. On or about February 7, 1948, at Everett, Washington, the defendant Garfield C. Barnett gave to Harvey Neylon two bottles, each containing a narcotic drug.

6. On or about February 7, 1948, at Everett,

Washington, the defendant Garfield C. Barnett delivered to Joseph E. Goode a box containing the drugs described in the first count in this Indictment.

All in violation 18 U.S.C. 88."

Defendants Barnett and Macartney were arraigned and plead not guilty to both counts of the indictment. Defendant Douglas was not present. On the day scheduled for trial Defendant Macartney changed his plea on Count II to one of guilty. Defendant Douglas was arraigned and plead guilty to Count II, no plea being entered to Count I.

Trial was had as to defendant Barnett only and the jury returned a verdict of guilty on both counts.

Count I of the indictment was dismissed as to defendants Douglas [8]* and Macartney [9] and they were never brought to trial on that count.

Motions for judgment notwithstanding the verdict or for a new trial were denied by the District Court [12].

SPECIFICATION OF ERRORS

Appellant herein claims that the trial judge

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*Page numbering appearing at top of page of printed Transcript of Record.

committed error (1) in allowing testimony of Ralph R. Macartney, Jr., and Leonard A. Douglas as to conversations had between them not in the presence of defendant; (2) in taking over examination of witness, Harvey Naylon and calling undue attention thereto; (3) in denying appellant's motion for acquittal at the close of plaintiff's case, and (4) in denying appellant's motion for judgment notwithstanding the verdict or for a new trial.

ARGUMENT ON SPECIFICATION No. 1

The District Court erred in allowing testimony of Ralph R. Macartney, Jr., and Leonard A. Douglas in evidence as to conversations they had in the absence of the appellant. Testimony of Ralph R. Macartney in this connection commences on page 19 of the printed transcript of record and that of Leonard A. Douglas on page 147.

In *Quercia v. U. S.* 70 Fed. (2d) 997, the court held that admissions or statements of one or two codefendants not in the presence of the other are not admissible against the absent one. Unless there is other evidence of joint action, this is a correct rule; but where there is prior evidence of an agreement to commit, or the joint commission of an offense, the statement of one is evidence against all who are con-

cerned in it, if made in furtherance of the common design.

It is to be noted that in the instant case the sale count (Count I) was dismissed as to both Macartney and Douglas. The eagerness with which the witnesses testified is best exemplified by that testimony of Macartney on page 33 where he said

> "I entered a plea of guilty because technically I was guilty * * *"

Both witnesses were confined in the Washington State Penitentiary for other offenses and were eager to escape any further possible confinement, as one of them did. [7 and 8]

A review of the testimony shows that defendant Douglas never had any conversations with appellant at all concerning either a sale or a conspiracy and testimony of conversations he had with Macartney clearly should not have been admitted because those conversations were not in furtherance of any common design involving appellant.

Testimony of Macartney does not add up to a straight story except in his effort to try to gain leniency for himself by testifying. His testimony in one regard was that there was to be a three-way split between himself, Douglas and appellant and that he

and Douglas had agreed upon this. Then on page 40 he testified that he was to get nothing except attorney fees, which, on pages 34 and 35, he testified had already been provided for by his father. All the testimony of Macartney and Douglas taken as a whole does not show any common design on the part of three people to form a conspiracy.

ARGUMENTS ON SPECIFICATIONS III and IV

The District Court erred in denying appellant's motion for acquittal at the close of plaintiff's case and in denying the appellant's motion for judgment notwithstanding the verdict or for a new trial.

The question to be determined is whether the evidence introduced shows a completed sale under the law.

Appellant was charged with having sold, bartered, and exchanged to one Joseph E. Goode certain narcotic drugs as set out in the indictment, supra. Taking the most favorable view possible of the government evidence the testimony presented does not show a sale, barter or exchange.

In order to have a sale there must be a complete agreement between the parties as to the terms of the

sale and including a transfer of the property or a payment of money.

This court in *Ratigan v. U. S.*, 88 Fed. (2d) 919, held that the essence of a sale is a transfer of property in a thing for money. The facts as briefly stated in the opinion show that defendant had given narcotics to a third person by hypodermic injection. The court held that there must be a delivery to have a sale and that transfer by hypodermic was a delivery and therefore constituted a sale.

In *Fisk v. U. S.*, 279 Fed. 12, the court held that a sale was completed when the price was agreed upon and the drugs had been delivered to and accepted by the inspector and were under his control and possession although the money had not yet been paid.

In *Hurwitz v. U. S.*, 299 Fed. 449, the facts as briefly in the opinion were that a buyer had paid $50.00 in marked money to a doctor in her house for narcotics and on the way out to his car to get them he was arrested and had the marked money on his person. The court held this was sufficient evidence to show a completed sale and not merely an executory contract of sale.

In the case of *Reyff v. U. S.*, 2 Fed. (2d) 39, the court held that a sale of liquor was complete when

all terms had been agreed upon, the money had been paid to the seller and nothing remained to be done except to deliver the liquor.

In *Canadian Northern Railway v. Northern Mississippi Railway*, 209 Fed. 758, at page 761, the court held that under a contract of sale of personal property for cash the title and ownership of the property remains in the vendor until the purchase price is paid in cash.

In *Ahearn v. U. S.*, 3 Fed. (2d) 808, the court held that a sale was complete when all terms of a sale of liquor had been agreed upon, including the quantity to be sold, the purchase price, the time and place of delivery and delivery had in fact been made.

A sale is a contract which, of course, requires a meeting of the minds first and then the actual doing of something to transfer the property itself or title to it.

Agent Goode never intended to buy and could not have bought anything for $6,000.00 because by his own testimony [87] he had only $302.00 with him. Agent Crisler testified [98] that he had furnished Agent Goode with $500.00 in various denominations of currency. Thus Agent Goode never in his own mind intended to buy anything.

Government witnesses, Harvey Naylon and Joseph Goode testified that they and appellant were the only parties present at the time of the purported sale.

No where in the testimony of Agent Goode is there any mention of any kind of narcotics, yet there are eight kinds which he is supposed to have bought according to the indictment, including some powdered and some in tablet form.

Agent Goode testified [88 and 89] that a price of six thousand dollars had been agreed upon and also that a price of $6.00 a grain had been agreed upon. This testimony would indicate that no final agreement had been made.

Harvey Naylon testified [70] that a price of $6.00 a grain had been agreed upon but that Agent Goode wanted to count the narcotics. Naylon makes no mention at all of any $6,000.00 agreement. It is from the testimony of these two men that we must find evidence of a final agreement of sale, if such agreement ever existed.

The testimony of these witnesses does not show an agreement that would sustain an action at law for the sale of goods. There was no agreement as to what was to be sold, the quantity or the price of it. A look at the number of different things in the indictment

shows clearly that an agreement to sell them could not possibly have been arrived at without more than is shown by the testimony here.

Agent Goode testified [96] that he never handed over any money or paid a cent to appellant.

This court in the Ratigan case, supra, held that the essence of a sale is a transfer of the property in a thing for money.

But, even assuming that an agreement had been made for the sale, no money had been paid. The question, then, is whether a delivery was made. It can be seen from the Ratigan case, the Fisk case, the Reyff case, the Canadian Northern Railway case, and the Ahearn case, all supra, that there must be an agreement and a payment of money or delivery of the goods before it can be said that there was a sale.

In the instant case, no delivery to Agent Goode was ever had, and the narcotics were never in his possession or under his control, even after appellant had been arrested. Testimony of Agent Goode [89] was that the box of narcotics was placed on a table and that he looked at them and then said, "Well, it looks like all the tablets are here. I will take it." This clearly indicates that up until this time, Agent Goode had not agreed to take anything, otherwise there was no reason for his saying, "I will take it."

It should be noted that he never took any narcotics, and never paid a cent. His next move was to arrest appellant.

Harvey Naylon testified [81 and 82] that Goode arrested appellant as soon as the box was opened up and also that he, Naylon, took some narcotics at that time. Agent Goode [95 and 96] did not see Naylon take anything — thus further demonstrating that Goode did not have any narcotics in his possession or under his control at any time.

As can be seen from the above cited cases the courts have consistently held that to have a sale for cash there must be an agreement as to all parts of the sale *and* a delivery of the goods or a payment of the money. In the instant case there was no such agreement and there was no payment of money and no delivery of anything.

A review of the other cases shows that in every instance there must have been an agreement of sale and delivery of goods or payment of money.

In the case of *Hammer v. U. S.*, 249 Fed. 336, the court talks about an agreement being a completed sale when nothing remains to be done except deliver the goods and receive the money. It is to be pointed out that the facts of that case do not bear out the

syllabus statement. The facts, as briefly stated in the opinion, show that defendant placed a package of narcotics in interstate commerce by sending them via collect express, consigned to a buyer in another state. The package was consigned in the buyer's name to a destination named by him and therefore had left defendant's control and possession — hence was delivered to the buyer.

The courts in numerous cases have held that the evidence was sufficient to show a sale but an examination of each case shows that a delivery was in fact made or money was in fact paid.

In *Leon v. U. S.*, 290 Fed. 384, this court upheld a conviction for dealing in narcotics without having registered and paid the tax. A government agent agreed to buy morphine at $65.00 an ounce, had tasted it, wrapped it up and put it in his pocket. He pulled out his money and said "Here" and then pulled a gun and arrested defendants.

In *Hirata v. U. S.*, 290 Fed. 197, this court held that a sale was shown where the facts were that a police officer gave a girl some marked money with which to buy morphine from defendant. She went into a hotel, met defendant and came out with a package of morphine which she gave to the officer who

then arrested defendant and found the marked money in defendant's pocket.

In *Sterling v. U. S.*, 289 Fed. 635, an indictment charged a sale of narcotics to a government agent. The evidence showed that the agent went with a third party to defendant's house where the agent gave money to this third party who then went upstairs with defendant and then came down with narcotics which he delivered to the agent. The court held that the evidence did not show a sale to the government agent.

In *Crampton v. U. S.*, 16 Fed. (2d) 231, the evidence was that government agents searched a witness, gave him marked money and observed him going into and coming out of a drugstore. The witness was again searched and had morphine on him. The agents arrested a woman in the drugstore as she was attempting to wash the marked money down a sink. The court held that delivery of morphine and possession of marked money by the defendant was sufficient to support a conviction of sale.

In *Smith v. U. S.*, 284 Fed. 673, the facts showed that government agents gave defendant money for a sale of narcotics and then took it away from him to use for evidence. The court held that a sale was

shown even though they planned to take back the money they had paid him.

In every case cited the courts have held that there is no sale unless there has been an agreement and a delivery of either the goods or the money. The writer had found no cases of record where it has been held to be a sale unless there was an agreement and a delivery of goods or payment of money. In the millions of daily business sales nothing is taken as sold unless there is first an agreement and then a delivery of the goods or a payment of money.

The courts have held in cases too numerous to cite that the federal narcotics act is a taxing act and must be construed as such.

It is significant that Congress has not found it necessary to amend the act in order to define what constitutes a sale. The courts have been unanimous in holding that a sale was not complete until an agreement was made, and a delivery of the goods or payment of money for them. Every case cited herein holding that a sale was shown, had as part of its facts an absolute agreement and a transfer of physical possession of the property or a payment of money as in the marked money cases.

Criminal and tax laws are all statutory and are to be strictly construed. It is neither the duty or

privilege of the court to change such laws by judicial decision. The cases cited all uphold a strict construction of the law and we respectfully pray that this continue to be the case and that this court correct the error of the District Court in this case.

Respectfully submitted,

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